In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1453

ALFRED EARL HARFLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 436 F. 2d 928.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1970. A petition for rehearing was denied on February 8, 1971. The petition for a writ of certiorari was filed on March 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the stopping of an automobile on a public

highway to question the occupants about their suspicious behavior constituted an arrest.

2. Whether the subsequent warrantless search of petitioner's automobile was reasonable.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of possession of an unlawfully made firearm in violation of 26 U.S.C. (Supp. V) 5861(c) and one count of possession of a firearm not registered to him in violation of 26 U.S.C. (Supp. V) 5861(d). He was sentenced to concurrent prison terms of ten years. The court of appeals affirmed (Pet. App. A).

Shortly before dawn on February 22, 1969, Mr. Leslie Heriford awoke and observed a late model black and white Chevrolet standing crosswise in the road with its headlights shining on his barn. Heriford, who had been warned that "something might happen" to his equipment (H. Tr. 17), saw the car turn and drive slowly past the house (Tr. 87-88, 254, H. Tr. 6-8).[1] After telling his wife about this, he proceeded toward his office in Ava, Missouri, stopping enroute for coffee at a cafe with his nephew (Tr. 89, H. Tr. 8-9). There he received a telephone call from his wife informing him that she had just seen a similar car drive past their home and had observed tire tracks in the vicinity of the

[1] Tr. refers to the trial transcript and H. Tr. to the transcript of the hearing on a motion to suppress evidence, copies of which are being lodged with the Clerk of this Court.

18,000-gallon gas storage tank Heriford maintained on his premises (Tr. 84-86, 89, 108, H. Tr. 10-11).

Heriford drove back to the storage tank and, upon seeing the tire tracks around the tank, also noticed a set of distinctive footprints in the snow (Tr. 89-91, H. Tr. 12-13). When he returned to Ava shortly thereafter, he spotted a car similar to the one he had seen near his barn parked in front of another cafe (Tr. 92, H. Tr. 14). Heriford entered the cafe and saw two strangers later identified as petitioner and his companion, Nash. The companion's boots appeared to match the footprints observed at the tank (Tr. 93-94, H. Tr. 15). Heriford sent his nephew to locate the local state trooper so that he could find out why the men had been around his place (Tr. 94, H. Tr. 14).

Trooper Davis drove over to the cafe after being informed by the nephew of what Heriford had observed (Tr. 110-111, H. Tr. 31-32). As the trooper arrived, petitioner and Nash drove off (Tr. 95-96, H. Tr. 32-33). Since the occupants of the car appeared to be strangers, Davis called headquarters for a check on the car. He was informed that the car was registered to a Robert Brockman of St. Louis, Missouri (Tr. 111-112, H. Tr. 33, 35).

Heriford met the trooper and informed him of the earlier events and the warning he had previously received. He stated that the car appeared to be the same one he had seen that morning and that the boots worn by petitioner's companion appeared to be similar to those that had made the footprints around his bulk storage tank (H. Tr. 17, 26, 34).

Trooper Davis and his partner then proceeded in their marked patrol car in the direction petitioner had driven (Tr. 113, H. Tr. 35). Petitioner's car had by then turned around, and passed the troopers heading back toward the town square. Trooper Davis turned his car around and followed (Tr. 114, H. Tr. 35-36). As petitioner's car approached the square, it started into the square as if to go in the wrong direction on the one-way street, then abruptly turned and went the correct way (Tr. 116, H. Tr. 38). At this point the trooper turned on the patrol car's red light and petitioner pulled his car diagonally into the curb (Tr. 116, 257, H. Tr. 38, 39).

Petitioner and Nash got out and were met at the rear of their car by the two officers (Tr. 117, H. Tr. 40). Davis inquired about their business in Ava and asked for their identification. Both men produced their driver's licenses. Petitioner stated that he was looking for a friend named "Art." Nash said that he was a heavy equipment operator and was looking for work (Tr. 117-119, H. Tr. 40-41). Petitioner stated that the car belonged to a friend but he refused to name the friend and failed to produce registration papers for the car (Tr. 119, H. Tr. 41-42).

After looking into the rear window (Tr. 120, 121, H. Tr. 42), Davis walked toward the front of petitioner's car. Through the passenger side door, which Nash had left open, he saw what appeared to be the handle of a chrome-plated handgun (Tr. 122, H. Tr. 43). Davis then went around the car and opened the door on the driver's side. Finding nothing under the

driver's seat, he reached over and got the gun, a fully loaded .38 caliber revolver. He also recovered a loaded clip of .45 caliber ammunition from under the other side of the seat (Tr. 122, H. Tr. 45). Davis unloaded the .38 revolver, informed petitioner and Nash that they were under arrest for carrying concealed weapons, and gave the men *Miranda* warnings (Tr. 123, H. Tr. 45-46).

Thereafter at Trooper Davis' request, petitioner opened the car trunk with his keys (Tr. 123, H. Tr. 46). Inside the trunk Davis saw a cardboard box containing ten sticks of dynamite, a clock, a fuse, a blasting cap and a battery with wires running from the dynamite to the clock and the battery. The clock was ticking (Tr. 123-126, 138, H. Tr. 46). Petitioner and Nash, both of whom disclaimed any knowledge of the device (Tr. 126, 259, 260, H. Tr. 47), were then handcuffed and taken to the nearby sheriff's office (Tr. 127, 258, 279, H. Tr. 47). Since a crowd had begun to gather, Trooper Davis locked the car trunk after disconnecting the wires and had a bystander drive it to the sheriff's office (Tr. 124-127, 128, H. Tr. 47-49, 65).

Davis returned to the sheriff's office and booked the two subjects. They were again given *Miranda* warnings and refused to answer any questions (Tr. 128, 258-259, H. Tr. 50). The car was then reopened and the device brought from the car into the sheriff's office where it was disassembled (Tr. 128-129, 160-162, H. Tr. 50). It was established that the seized components constituted a time bomb that could have been readily activated (Tr. 186-190, 195-197). One stick of dynamite

and one blasting cap were test fired and functioned as designed (Tr. 166-167, 184-185). The device was not registered as required by 26 U.S.C. (Supp. V) 5861 (Tr. 198-201).

ARGUMENT

1. Petitioner principally contends that the stopping of his automobile for investigatory questioning, without probable cause to believe that he had committed a crime, was an unlawful arrest and that any evidence obtained incident to that stopping should have been suppressed.

Terry v. *Ohio,* 392 U.S. 1, 19-20, recognized the distinction between an arrest and a limited detention of the person short of arrest by holding that the latter could be done for investigative purposes on the basis of reasonable suspicion less than probable cause. There is no distinction between the rights of the pedestrian walking on the public streets, involved in *Terry,* and those of a person driving on the same streets in an automobile. As the court below held, both are subject to the limited intrusion approved in *Terry.* Petitioner relies on *Henry* v. *United States,* 361 U.S. 98. But in that case the government felt bound by a concession in the lower courts that the arrest took place at the time the car was stopped; this court accepted the concession and determined the case on that basis.[2] See

[2] "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view of the *facts of this particular case.* When the officers interrupted the two men and restricted their liberty of movement, the arrest, *for purposes of this case,* was complete." 361 U.S. at 103 (emphasis added; footnote omitted.)

also *Rios* v. *United States,* 364 U.S. 253. The courts of appeals that have ruled on the issue have uniformly held that the mere stopping of a car does not of itself constitute an arrest. *United States* v. *Thompson,* 420 F. 2d 536 (C.A. 3); *Carpenter* v. *Sigler,* 419 F. 2d 169 (C.A. 8); *United States* v. *Williams,* 416 F. 2d 4 (C.A. 5), certiorari denied *sub nom. Ferino* v. *United States,* 397 U.S. 910; *Trusty* v. *Oklahoma,* 360 F. 2d 173 (C.A. 10). See also *United States* v. *Johnson,* C.A.D.C., No. 23,900, decided March 22, 1971.

Under the test announced in *Terry,* it is clear that: (1) Trooper Davis' limited action "was justified at its inception"; and (2) the action "was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. Had proper proof of ownership of the car been forthcoming, and had no other incriminating circumstances developed, petitioner would presumably have been allowed to proceed on his way after very brief and limited questioning. During this time, however, the officer observed a revolver in the car in plain view, and this led to the arrest. No search of the subjects or their car was attempted prior to this discovery. Under these circumstances, the limited "seizure" of petitioner was reasonable.[3]

2. There is no substance in petitioner's contention that the discovery and seizure of the bomb in the trunk violated the Fourth Amendment. The revolver, which

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[3] As the court below noted, the propensity of Trooper Davis to interfere with out-of-state travelers is irrelevant. (Pet. App. A9-A10.) The basis of his action in this case was reasonable suspicion of criminal activity based on facts disclosed by a reliable citizen.

was visible to the trooper through the open door of the car from a vantage point where he had a right to be, was properly subject to seizure. *Harris* v. *United States,* 390 U.S. 234. The discovery of the revolver provided probable cause to arrest petitioner as well as an adequate basis to search the car for other weapons. *Chambers* v. *Maroney,* 399 U.S. 42; *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132. Once the trunk was opened and the bomb discovered, its seizure was proper. The fact that the bomb was not seized until after the car had been removed from the scene, where a crowd had gathered, did not invalidate the seizure; the officers had a duty to protect the public from danger.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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